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Abstract

This paper discusses the “recovering” of a dimension of the intellectual apparatus of Marshall Court sovereignty opinions, particularly those opinions that have to do with the apparent division of powers, among the branches of the federal government and the states, that was anticipated by the Framers of the Judiciary Act of 1789.

Recovering Coterminous Power Theory

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This paper discusses the “recovering” of a dimension of the intellectual apparatus of Marshall Court sovereignty opinions, particularly those opinions that have to do with the apparent division of powers, among the branches of the federal government and the states, that was anticipated by the Framers of the Judiciary Act of 1789. In particular, this paper focuses on the consciousness of Marshall and his contemporaries with respect to state and federal power, and on the issues that were central to that consciousness.

I

Most everyone knows the “highlights” of the Marshall Court. After the Judiciary Act of 1789, with all its cryptic and ambiguous language, was enacted, *Marbury v. Madison*¹ was decided, and then, after an interval, came the great sovereignty cases of the major phase of the Marshall Court: *Martin v. Hunter’s Lessee*,² *Cohens v. Virginia*,³ *McCulloch v. Maryland*,⁴ *Osborn v. Bank of the United States*,⁵ and *Gibbons v. Ogden*.⁶ Numerous commentators have written about those cases, stressing that they were generally perceived as infringing on the sovereignty of the states, and that they were severely criticized by so-called states rights advocates, many of whom centered in Virginia. Such advocates included Thomas Richie, editor of the *Richmond Enquirer*; Spencer Roane, judge of the Virginia Court of Appeals; and William Brockenbrough, a longtime Virginia judge and politician. It is

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1. 5 U.S. (1 Cranch) 137 (1803).
2. 14 U.S. (1 Wheat.) 304 (1816).
3. 19 U.S. (6 Wheat.) 264 (1821).
4. 17 U.S. (4 Wheat.) 316 (1819).
5. 22 U.S. (9 Wheat.) 738 (1824).
6. 22 U.S. (9 Wheat.) 1 (1824).

also widely known, largely through the efforts of Gerald Gunther, that there was a pamphlet war being conducted between 1819 and 1822 on both sides of the sovereignty debate. In that war, *Martin v. Hunter's Lessee*, *McCulloch*, and *Cohens* were all criticized by pseudonymous essays in the *Richmond Enquirer*, and the Marshall Court responded anonymously to those criticisms. Marshall himself wrote two defenses of the Court's sovereignty opinions, one under the pseudonym "A Friend of the Union,"⁷ and the other under "A Friend of the Constitution."⁸ Justice Bushrod Washington helped find publication outlets for those essays,⁹ while Henry Wheaton, the Court's Reporter, wrote his own pseudonymous defense and arranged for its publication.¹⁰

All the above is widely known among students of the history of the Supreme Court. But what has largely been ignored by commentators is a cluster of assumptions in the sovereignty debate about the relationship between the respective branches of the newly created federal government. I believe that this cluster of assumptions has largely been "lost" to modern commentators, and I want to begin recovering this lost cluster—which I will designate by the phrase "coterminous power theory"—by reading a couple of quotations from contemporaries at the time of the Marshall Court.

The first quotation is from St. George Tucker, a treatise writer, a Virginia state judge, and a professor of law at William and Mary, who is probably best known for his 1803 edition of *Blackstone's Commentaries*.¹¹ Tucker's *Blackstone* is a remarkable work, because it is not just an updating of Blackstone's previous editions. It is also a treatise in

7. Alexandria Gazette, May 15, 17, 18, 1819, reprinted in G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, 78-105 (1969).

8. Alexandria Gazette, June 30, July 1, 2, 3, 5, 6, 9, 14, 15, 1819, reprinted in G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155-214 (1969).

9. See G. Gunther, *Unearthing John Marshall's Major Out-of-Court Constitutional Commentary*, 21 STAN. L. REV. 453 (1969); G. E. WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 550-60 (1988) (this is an introduction to Gunther's article, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449 (1969)).

10. The essay by Wheaton, under the pseudonym "A Federalist of 1789," appeared in the New York American on August 16, 1821. See White, *supra* note 9, at 521-22.

11. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OR REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA* (1969) [hereinafter *BLACKSTONE'S COMMENTARIES*].

itself, containing pamphlets on various subjects, including slavery, western lands, and criminal law, that Tucker felt were important. In Tucker's day, of course, legal training was directed not only toward people who were going to be lawyers, but also toward people who were going to be "statesmen" and "virtuous citizens." So Tucker assumed it was appropriate for treatise writers to discourse on political issues as well as to update Blackstone.

The quotation from Tucker was precipitated by a decision in a 1799 case called *United States v. Williams*,¹² by Chief Justice Oliver Ellsworth, sitting on the circuit bench. In that case, Ellsworth, who was a Federalist, concluded that there was a federal common law of crimes; that the common law of England had become part of the "laws of the United States" within the meaning of article III of the U.S. Constitution; and that the "common law of the United States" included judge-made decisions as well as statutes.¹³ Tucker's reaction was the following: he first said,

[The *Williams* decision] is of very great importance, not only as it regards the limits of the jurisdiction of the *federal* courts; but also, as it relates to the extent of the powers vested in the *federal government*. For, if it be true that the common law of England has been adopted by the United States in their national or federal capacity, the jurisdiction of the *federal courts* must be coextensive with it. . . .¹⁴

In other words, if there is a "common law of the United States," then the jurisdiction of the federal courts will reach as far as that common law can reach, or, as Tucker next said, they will be "*unlimited*."¹⁵ Then came a startling Tucker sentence: "[S]o also must be the jurisdiction and authority of the *other branches* of the federal government, that is to say their powers respectively must be, likewise, *unlimited*."¹⁶ In sum, in the paragraph quoted, Tucker argued that if there were a federal common law of the United States, not only would the jurisdiction of the federal courts extend to every "legal" subject, but that the

12. Connecticut Courant, April 30, 1799.

13. *Id.*

14. 1 BLACKSTONE'S COMMENTARIES, *supra* note 11, at 380 (emphasis in the original).

15. *Id.* (emphasis in the original).

16. *Id.* (emphasis in the original).

jurisdiction of Congress would likewise thus extend.¹⁷

The quotation from Tucker sounds alien to us, and this paper will elaborate on that observation shortly. But briefly turning now to the second quotation from Chief Justice Marshall, in his opinion for the Court in *Osborn v. Bank*,¹⁸ recall that the *Osborn* case involved the question of whether Congress, in creating a National Bank, had precluded state courts from entertaining suits where the Bank was a party to the litigation.¹⁹ Marshall concluded that the Bank's charter did insulate it from being sued in a state court.²⁰ At the very end of the opinion, he anticipated that some critics of the Court might find the result in *Osborn* motivated by partisan concerns.²¹ Not so, he suggested; the Court was merely performing its "duty."²² He then went on to say,

[c]ourts are the mere instruments of the law [J]udicial power, as contra-distinguished from the power of the laws, has no existence [J]udicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purposes of giving effect of the will of the Legislature; or, in other words, to the will of the law.²³

This quotation is one that many of us will recognize, and some of us may smile when we hear it: the quotation is a familiar judicial disclaimer. Judges do not make laws; judges just follow the dictates of somebody else, whether the legislature's statutes, or the Framers' Constitution, or long-established "principles" of common law. Judges, in the disclaimer, are just mouthpieces for finding and declaring the law, the law being something that has already been laid down by somebody else.

We may well say, as moderns, that that is not the way lawmaking works. Judges are themselves lawmakers, particularly creative ones. We may well believe that when judges interpret the Constitution, they are not simply following the literal meaning of the text. We may well suspect that when judges apply common law principles to new individual cases, they are changing the meaning of those principles in the pro-

17. *Id.*

18. *Osborn*, 22 U.S. (9 Wheat.) 738 (1824).

19. *Id.*

20. *Id.* at 870-71.

21. *Id.* at 870.

22. *Id.* at 865.

23. *Id.* at 866.

cess. And we may be quite sure that when judges interpret the meaning of a statute, they are helping to supply that statute's meaning, not just following the literal commands of the legislature. So what does Marshall mean in making a distinction between "the will of the law" and "the will of the judge?" He may have fashioned a distinction without a difference.

But this response to the Marshall quotation is quite a different response from that which most of us might have to the Tucker quotation. That quotation, some of us might be inclined to say, is alien in its logic. We might grant that the extension of the common law into the criminal arena, thereby creating, before *Erie R.R. v. Tompkins*,²⁴ some kind of "federal common law of crimes," *could* result in federal courts having an expanded jurisdiction. It does not mean that the federal courts necessarily *would* have an expanded jurisdiction, because Congress can limit the jurisdiction of the federal courts. That is what article III of the Constitution says. Article III says, "such inferior courts as the Congress may ordain and establish,"²⁵ which means that Congress can take jurisdiction from federal courts as well as grant them jurisdiction. So why does Tucker think that it follows from the promulgation of a federal common law of crimes, that the jurisdiction of the federal courts will be unlimited?

Even if one grants Tucker more, and agrees that there is no meaningful distinction in practice rather than in theory, between the doctrinal rulemaking powers of courts and their jurisdictional powers, there is still the last step in his logic to puzzle over. How can he think that if the jurisdiction of the federal *courts* (once a federal common law of crimes was created) would be unlimited, so also would the jurisdiction of the federal *legislature*, i.e. Congress? To moderns, the jurisdictions of Congress and the federal courts do not seem symbiotic. Indeed, Congress' and the federal courts' jurisdictions would both seem to be limited by the Constitution itself. In fact, one need not say "seem to be limited;" modern commentators take as a given that the Constitution sets jurisdictional limits on both of those branches of government. That "given" is not taken by Tucker at all.

I want to unravel the logic of both these quotations, beginning with Tucker's and working my way toward that of Marshall's. I have learned over the years that it is almost always a mistake, when con-

24. 304 U.S. 64 (1938) (state law governs substantive rules of decisions in the federal courts).

25. U.S. CONST. art. III, § 1.

fronted with the logic of a person from another time and place, to conclude that because the person's logic seems alien, he or she was either very stupid or perhaps insane. That mistake is perhaps not as serious as the one of concluding that modern generations are necessarily wiser and more honorable than their predecessors, but it is serious nonetheless. What is more likely occurring, when those of us in the present encounter what we take to be anomalous or alien reasoning from the past, is a dissonance in intellectual assumptions. "They" (the ones with the alien logic) are taking things for granted, starting from tacit premises that "we" in the present can no longer fathom, and that we have long since abandoned.

I have concluded that Tucker's belief that for every extension of federal judicial power there would be a corresponding extension of federal legislative power, and vice versa, was premised on a cluster of assumptions that amounted to a widely held proposition of political theory at the time of the framing of the Judiciary Act of 1789 and during the early and middle years of the Marshall Court. I am calling that proposition the "coterminous power theory." It presupposed that in any "effective" republican form of government, the power of the judiciary would necessarily be coextensive with the power of the legislature, and vice versa. The remainder of this section of the paper will seek to recover that cluster of assumptions.

The search for the origins and evolution of coterminous power is a complex and lengthy one which I will attempt to telescope here. The story begins, for present purposes, with the familiar legacy of transatlantic sources that the Framers of the Constitution, and their opponents, used to reform their thinking about issues of political theory. Montesquieu, Blackstone, and the oppositionist Whig pamphleteers of the mid-eighteenth century have regularly been identified as part of the legacy,²⁶ which has been extended as far back as Machiavelli.²⁷ A less familiar source is Jean-Louis DeLolme's *The Constitution of England*,

26. See, e.g., PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776 (B. Bailyn ed. 1965); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); G.S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

27. Pocock's tracing of American republican ideology to Machiavelli has been challenged by a number of scholars whose work has emphasized the diverse opinions of the American colonists. See, e.g., F. McDonald, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); Bloch, *The Constitution and Culture*, 44 WM. & MARY Q. 550 (1987); Howe, *European Sources of Political Ideas in Jeffersonian America*, 14 AM. HIST. 28 (1982).

which first appeared in French in 1771 and in an English edition in 1784.²⁸ From these sources the Framers and their opponents received insights that helped them create the unique version of American federated republicanism from which the Constitution sprang.²⁹

Particularly significant in the thought of those contemporaries of Tucker who shared his belief in the coterminous power theory seem to have been³⁰ three transatlantic insights: the separation of powers principle, derived from Montesquieu and applied to the English constitution by DeLolme;³¹ Blackstone's discussion of the nature of sovereignty in

28. Jean-Louis DeLolme was born in Geneva in about 1745. He published a book entitled *A PARALLEL BETWEEN THE ENGLISH CONSTITUTION & THE FORMER GOVERNMENT OF SWEDEN: CONTAINING SOME OBSERVATIONS ON THE LATE REVOLUTION IN THAT KINGDOM, & AN EXAMINATION OF THE CAUSES THAT SECURE US AGAINST BOTH ARISTOCRACY AND ABSOLUTE MONARCHY* (1770). He then published *THE CONSTITUTION OF ENGLAND*, which first appeared in French in 1771; the first English edition appeared in 1775. For biographical information on DeLolme, see the 1816 edition of *THE CONSTITUTION OF ENGLAND*, xvi-xix.

29. I am presenting the story as if it were non-controversial, but of course the nature and sources of American constitutional republicanism have recurrently been a matter of deep and wide scholarly controversy. It is, however, not important for my purposes in this essay that the precise intellectual origins of the Framers' political vision be settled upon, but merely that the significance of the aforementioned transatlantic sources be noted as a backdrop to the more specific developments in America that I am about to trace.

Two accessible sources for the vast literature on republicanism, and the relationship of republicanism to constitutional law, are Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property, 1760-1860*, (unpublished manuscript, forthcoming in 68 N.C.L. REV. (Fall, 1989)) and Fallon, *What Is Republicanism and Is It Worth Reviving*, 101 HARV. L. REV. 1695 (1989). See also M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); and Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988), for more explicit efforts to make connections between republicanism and modern constitutional decisions.

My understanding of the relationship of republicanism to Marshall Court decisions has been enhanced by discussions with Alfred Konefsky, Charles McCurdy, and Dorothy Ross. I also want to acknowledge the parallels between my characterizations of the cultural role of the Marshall Court in G. E. WHITE, *supra* note 9, at 5-10, 964-75, and Professor Ross's characterizations of nonlegal sources in her article, *Historical Consciousness in Nineteenth Century America*, 89 AM. HIST. REV. 909 (1984), which I inadvertently omitted from a citation of influential sources in G. E. WHITE, *supra* note 9, at 48-49.

30. The qualified language is used advisedly, since the citation of transatlantic sources in the literature of Tucker's contemporaries was sparse and imprecise.

31. See, e.g., MONTESQUIEU, *THE SPIRIT OF LAWS*, 201-13 (D. W. Carrithers ed. 1977); DELOLME, *supra* note 28, at 154-68.

his *Commentaries*, especially his assertion that any government must have the means to preserve its existence by enforcing its own laws;³² and the belief of oppositionist Whig writers that in any form of government, even a republic, those holding power will be inclined to preserve and to expand their power, making pure versions of a separation of powers theory problematic in practice.³³

From these insights, from their own visions of the great promise and potential pitfalls of republican government in America, and from their sense of the fragile and potentially divisive character of the governmental structure created by the Articles of Confederation, the Framers began to work out their constitutional design. From comparable starting premises, their opponents in the ratification debates, conventionally known as the Anti-Federalists, began to develop their critiques of that design. Out of this complex swirl of ideas and cultural experiences, the coterminous power theory began to take shape. I will subsequently be discussing in more detail the role of trans-atlantic sources in shaping American articulations of coterminous power theory. At this point, however, I want to turn to the American commentators themselves, and discuss the embryonic formulations that reached their mature and polemical form in the passage from Tucker.

The first stirrings of the coterminous power theory that I have located came after the dissemination of the text of the Constitution in preparation for the debates over its ratification. Almost simultaneously, in Georgia, Maryland, Massachusetts, New York, Pennsylvania, and Virginia, Anti-Federalists began to react, in the form of published commentary, to three features of the Constitution: certain language in article I, certain language in article III, and the Supremacy Clause of article VI.³⁴

32. BLACKSTONE'S COMMENTARIES, *supra* note 11, at 49.

33. See Howe, *European Sources of Political Ideas in Jeffersonian America*, 10 REV. IN AMER. HIST. 28, 29-36 (1982).

34. The most accessible and learned source of Anti-Federalist literature is THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981) [hereinafter ANTI-FEDERALIST] which I have used as my primary reference. The extent to which the several writers were aware of each other's contributions, given the difficulties in disseminating published materials at the time of the Constitution's framing, is difficult to discern with any precision. Storing and his successor, Murray Dry, did a masterful job of locating cross-references, but any precise chronology of the flow of ideas among Anti-Federalists appears an impossible task of reconstruction, and is probably not very significant in any event: ideas such as those quoted and cited in the text that follows were clearly "in the atmosphere" of the ratification debates.

Of these commentators, taken in alphabetical order by state, remarks by "A Georgian," Luther Martin (Maryland), "Agrippa" and "A Columbian Patriot" (Massachusetts), "Brutus" and George Clinton (New York), "Centinel" and "A Federal Republican" (Pennsylvania) and "The Federal Farmer," "The Impartial Examiner" and James Monroe (Virginia) are of greatest interest to this essay. By far the most detailed and searching of the comments are those of "Brutus," which will subsequently be considered in some detail.³⁵ The other comments will be treated collectively.

Since most of the Anti-Federalist commentators reacted to the text of the Constitution in the chronological order of its proposed articles, I have grouped the collective comments accordingly. They may be preliminarily summarized as follows. Article I provoked reactions that emphasized the indefinite and potentially excessive powers of Congress, as well as more general ruminations about the threats posed to state sovereignty by those powers. Article III prompted comparable comments about the potential scope of the jurisdiction of the federal courts, most notably the Supreme Court, and commentators revealed a particular concern about what moderns would call the substantive rulemaking powers of the federal courts, which they did not clearly distinguish from their jurisdictional powers. The Supremacy Clause did not come to the attention of some early commentators, but those who noted it found that its presence reinforced their article III concerns.

None of these reactions, as summarized, may appear startling to persons familiar with the ratification debates. But the actual manner in which they were presented in the commentary is not what moderns might expect. Consider this passage from Luther Martin's "Information to the General Assembly of the State of Maryland," a summary of his remarks to the Maryland House of Representatives on March 30, 1788:

Among other powers given to this government in the eighth section [of Article I], it has that of appointing tribunals *inferior* to the *supreme court*; to this power there was an opposition. It was urged that there was no occasion for *inferior* courts of the *general government* to be appointed in the different States, and that such ought not to be admitted—That the different *State judiciaries* in the re-

35. "Brutus" obviously had access to "The Federal Farmer's" pamphlet, which circulated widely, since portions of his letters were identical in language to that of "The Federal Farmer." For present purposes, however, "Brutus'" contribution dwarfs the others in significance.

spective States would be *competent to*, and *sufficient for*, the cognizance in the *first instance* of all cases that should arise under the laws of the general government, which being by this system made the supreme law of the States would be binding on the different State judiciaries—That by giving an *appeal* to the *Supreme Court* of the United States, the *general government* would have a *sufficient* check over their decisions, and security for the enforcing of their laws—That to have *inferior* courts appointed under the authority of Congress in the different States, would eventually *absorb* and *swallow up* the *State judiciaries* by drawing all business from them to the courts of the general government, which the *extensive* and *undefined* powers, legislative and judicial, of which it is possessed, would *easily enable* it do so—That it would *unduly* and *dangerously* increase the *weight* and *influence* of Congress in the *several States*. . . . But here again we were overruled by a majority, who *assum[ed]* . . . as a *principle* that the general government and the State governments (as long as they should exist) would be at *perpetual variance and enmity*.³⁶

Luther Martin as a source raises a number of complexities, such as his remarkable verbosity, his tendency toward “kitchen sink” arguments, his pugnacious, adversarial temperament, and the fact that he was a delegate to the Constitutional Convention who voted against the Constitution.³⁷ But even when these complicating factors are recognized, the quoted passage is a remarkably rich one for our purposes. Consider, for example, that in a discussion of article I, section 8 powers of Congress, Martin immediately invokes the Supremacy Clause and casts the argument in terms of clashes between federal and state sovereignty powers.³⁸ Consider also that he is shortly tempted to allude to “the *extensive* and *undefined* powers, legislative and judicial, of which [the federal government] is possessed.”³⁹ Consider further that he reminds his audience that the new federal judges will be appointed by Congress.⁴⁰ Finally, consider that he ends the passage with testimony to the views of the “majority” of Framers that “the general government and the State governments . . . would be at perpetual variance and enmity,” and even inserts the dire parenthetical “as long as they should

36. 2 ANTI-FEDERALIST, *supra* note 34, at 57 (emphasis in the original).

37. On the subject of Luther Martin, see G. E. WHITE, *supra* note 9, at 229-41; Reynolds, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291 (1987).

38. G. E. WHITE, *supra* note 9, at 229.

39. *Id.*

exist."⁴¹

In short, a number of distinctions made by modern commentators on the Constitution's arrangement of institutional powers are not made by Martin. He lumps together federal legislative power and federal judicial power as if Congress and the federal courts were parts of a "general government" monolith. He sees no constitutional limitations on either of the powers and he equates the Constitution's text with the design of a "majority" to favor the interests of the federal government (which he treats as being facilitated by Congress and the federal courts in combination) against the interests of the States. He does not reveal, in the passage, a modern conception of separation of powers principles in the abstract, or a modern conception of those principles as being embodied in the Constitution. His starting premises appear very close to those of Tucker.

Martin's remarks, regardless of their wide-ranging scope, were precipitated by a discussion of article I powers, and in this emphasis, Martin was typical of most Anti-Federalist commentators who tended to frame their discussion of federal judicial power in the context of article I rather than article III. A particularly succinct statement was made by "Centinel:"

The legislative power granted for these sections [(the general welfare and 'necessary and proper' clauses of article I, section 8)] is so unlimited in its nature, may be so comprehensive and boundless in its exercise, that this alone would be amply sufficient to carry the coup de grace to the state governments, to swallow them up in the grand vortex of general empire. But the legislative has an able auxiliary in the judicial department, [which] . . . may be made greatly instrumental in effecting a consolidation; as the federal judiciary would absorb all others.⁴²

A few commentators, however, did discuss article III powers.⁴³

41. *Id.*

42. 2 ANTI-FEDERALIST, *supra* note 34, at 168.

43. Those commentators whose discussions of article III are relevant for present purposes are "Agrippa," 4 ANTI-FEDERALIST, *supra* note 34, at 77; "A Columbian Patriot," *Id.* at 276; "The Impartial Examiner," 5 ANTI-FEDERALIST, *supra* note 34, at 182; James Monroe, *Id.* at 298-99; and George Clinton, 6 ANTI-FEDERALIST, *supra* note 34, at 184.

If the passage from Tucker is kept in mind, some language from the above commentators is striking. "The Impartial Examiner" announced that "[t]he Supreme Court . . . wears the aspect of imperial jurisdiction, clad in a dreary array, and spread-

Most prominent among those commentators were "The Federal Farmer" and "Brutus," particularly the latter. "The Federal Farmer," who suggested that "we must be sensible how cautious we ought to be in extending unnecessarily the jurisdiction of [the federal judiciary],"⁴⁴ seemed to have a more developed set of the assumptions, which I have identified with the coterminous power theory, than most of his contemporaries, as the following passage from his article I discussion suggests:

[W]e must examine and contemplate [the enumerated powers in article I] in all their extent and various branches, and then reflect, that the federal head will have full power to make all laws whatever respecting them; and carrying into full effect all powers vested in the union, in any department, or officers of it, by the constitution, in order to see the full extent of the federal powers, which will be supreme, and exercised by that head at pleasure⁴⁵

It is "Brutus," however, who provides us with the most complete and mature discussion of what he called "the nature and extent of the judicial powers"⁴⁶ under the proposed Constitution. "Brutus" has been a favorite of students of the framing period, and his letters have regularly been reprinted and commented upon.⁴⁷ His identity has been a

ing its wide domain into all parts of the continent. This is to be co-extensive with the legislature, and, like that, is to swallow up all other courts of judicature." 5 ANTI-FEDERALIST, *supra* note 34, at 182. Monroe asserted that "[t]he judiciary in this, as in all free governments, should be distinct from, and independent of the other branches, and equally permanent in its establishment. Performing its appropriate functions, the extent of its authority should be commensurate with theirs." *Id.* at 298. And Clinton referred to "the judicial department" as

rendered totally independent both as to the terms and emolument of their offices . . . and whose decrees are uncontrollable and fully competent to that purpose since it possesses still more extensive power, than the legislative and if possible still more dangerous to the existence of the States — for besides comprehending within its jurisdiction all the variety of cases, to which the other branches of government extend, it is authorized to determine upon all cases in law and equity arising under the Constitution.

Id. at 184.

44. 2 ANTI-FEDERALIST, *supra* note 34, at 168.

45. *Id.* at 340.

46. Reprints of the "Brutus" letters are to be found in E. S. CORWIN, COURT OVER CONSTITUTION 231-62 (1938); W. Jeffrey, *The Letters of Brutus — A Neglected Element in the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643 (1971); 2 ANTI-FEDERALIST, *supra* note 34, at 358.

47. *Id.*

subject of debate;⁴⁸ I am inclined to think that he was Robert Yates, a New York lawyer and judge, despite his statement at one point in his commentary that “[w]ith a regard to the nature and extent of the judicial powers, I have to regret my want of capacity to give that full and minute examination of them that the subject merits.”⁴⁹ “Brutus” added, at that point,

[t]o be able to do this, a man should be possessed of a degree of law knowledge far beyond what I pretend to. A number of hard words and technical phrases are used in this part of the [constitutional text], about the meaning of which gentlemen learned in the law differ.⁵⁰

I read this disclaimer as confirming rather than raising doubts about “Brutus’” technical proficiency.⁵¹ The best case for “Brutus” being Yates, however, is the breadth and depth of his insights, which would seem consistent with one who has had considerable experience in the interpretation of legal texts.

“Brutus’” discussion of the article III powers of the federal courts was the centerpiece of an elaborate and extended argument in which he confronted the supporters of the Constitution on most of the major themes of the ratification debates—“confederation” versus “consolidation,” the appropriate size of a republic, the need for a bill of rights, the nature of representation, and the nature and extent of the proposed powers of the new federal government. The particular context of “Brutus’” essays was the ratification debate in New York, where the Constitution was narrowly approved, and in which Alexander Hamilton and John Jay, two of the faces of “Publius,” resided. I will neither belabor “Brutus’” full argument nor most of his discussion of the nature of judicial power. This argument assumed the existence of judicial review;⁵² anticipated a theory of constitutional interpretation, stressing connections between the “people,” the “Union,” and the Constitution,

48. Commentators have disagreed as to the true identity of “Brutus.” Compare PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-88, pp. 117, 424 (Ford ed. 1888) with CORWIN, *supra* note 46, at 231, Jeffrey, *supra* note 46, at 644-46, and 2 ANTI-FEDERALIST, *supra* note 34, at 358.

49. Jeffrey, *supra* note 46.

50. *Id.*

51. Compare the discussion in 2 ANTI-FEDERALIST, *supra* note 34, at 363.

52. *Id.* at 423.

which informed the Marshall Court's sovereignty decisions;⁵³ and anticipated, in a breathtakingly prescient fashion, many of the arguments John Marshall would subsequently employ in the major sovereignty cases of the Marshall Court.⁵⁴

My attention will be concentrated on the internal logic of a certain portion of "Brutus'" argument. That portion begins with "Brutus'" assertion that the proposed federal government was "a complete system, not only for making, but for executing laws."⁵⁵ To demonstrate the truth of his assertion, he then argues that the article III powers are very extensive, that the newly created Supreme Court and lower federal courts will consistently favor the interests of the federal government and extend its jurisdiction, and that the vague and open-ended language of the Constitution will facilitate this process.⁵⁶ Then comes a passage worth lingering over:

Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts. . . .⁵⁷

One of the clearest examples of a source of the coterminous power principle appears in sharp relief within this passage. "Brutus" links the anticipated tendency of the federal courts and Congress to extend their jurisdiction, in a symbiotic fashion, to the "maxim" of republican theory that men who hold office "are tenacious of power" and seek both to

53. *Id.* at 425. See the discussion in G. E. WHITE, *supra* note 9, at 487-94, 511-19, 557-64.

54. See, e.g., 2 ANTI-FEDERALIST at 425 (latitudinarian interpretation of the Necessary and Proper Clause); and *id.* at 426-27, 431-35 (latitudinarian readings of article III jurisdiction). Compare *McCulloch*, 17 U.S. (4 Wheat.) at 316; *Martin*, 14 U.S. (1 Wheat.) at 304; and *Cohens*, 19 U.S. (6 Wheat.) at 264.

55. 2 ANTI-FEDERALIST, *supra* note 34, at 418.

56. *Id.* at 419-21.

57. *Id.* at 421.

preserve it and to expand it. Here we find a direct link to the oppositionist Whig literature, notably *Cato's Letters*,⁵⁸ Benjamin Hoadly's *The Origin and Institution of Civil Government Discussed*,⁵⁹ and Paul de Rapin's *A Dissertation on the Whigs and Tories*,⁶⁰ with its discussion of the tendency of republics to become corrupt because of the "interest" of officeholders in preserving their spheres of influence.

"Brutus" then continues his argument that the federal courts will invariably favor the interests of the federal government, noting that the English courts have persistently expanded their jurisdiction, and prepares the way for his most polemical contention, that "consolidation" will inexorably follow from the adoption of the Constitution.⁶¹ By now the arguments are familiar, but "Brutus" states them with unparalleled clarity and elegance. The proposed powers of article III will extend federal *legislative* authority, as the federal judiciary will proceed to construe article I provisions broadly.⁶² The proposed powers will also extend federal *judicial* authority. Since article III extends to "all cases," the diversity and "federal question" clauses of article III will be construed broadly, and the phrase "laws of the United States" is conveniently broad.⁶³ At this point another passage is worthy of merit:

The proper province of the judicial power, in any government, is, as I conceive, to declare what is the law of the land. To explain and enforce those laws, which the supreme power or legislature may pass; but not to declare what the powers of the legislature are. I suppose the cases in equity, under the laws, must be so construed, as to give the supreme court not only a legal, but equitable jurisdiction of cases which may be brought before them, or in other words, so, as to give them, not only the powers which are now exercised by our courts of law, but those also, which are now exercised by our court of chancery. If this be the meaning, I have no other objection to the power, than what arises from the undue extension of the legislative power. For I conceive that the judicial power should be

58. For a more detailed discussion of *Cato's Letters*, published in 1721, and its creators, John Trenchard and Thomas Gordon, see PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, *supra* note 26, at 29.

59. Hoadly's work was published in 1710, and is reprinted in PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 26 at 30.

60. Reprinted in PAMPHLETS OF THE AMERICAN REVOLUTION *supra* note 26, at 29-36.

61. 2 ANTI-FEDERALIST, *supra* note 34, at 422.

62. *Id.* at 423-26.

63. *Id.* at 426-28.

commensurate with the legislative.⁶⁴

This is a particularly revealing passage. "Brutus" begins by assuming the existence of a principle of sovereignty that can be traced directly to Blackstone, who had argued that "[b]y the sovereign power . . . is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it."⁶⁵ Blackstone then had particularized his argument: "all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end."⁶⁶ But "Brutus" formulates a different version of Blackstone's principle, one that recognizes the differences between prevailing theories of sovereignty in England and those adopted in America after 1787. "Brutus," in fact, begins his argument by adopting a position on sovereignty identical to that of Tucker in his 1803 edition of *Blackstone*. For after quoting Blackstone's view of sovereignty, Tucker had inserted a footnote suggesting that "this maxim does not apply to the governments of the United States."⁶⁷

"Brutus" thus follows Blackstone, yet also departs from him. The legislative power is "supreme," but not in the sense that Blackstone used supremacy in the British constitutional structure. "Brutus" nonetheless expresses concerns about the potential scope of the Supreme Court's jurisdiction under article III. The "supreme court should have authority to determine questions arising under the laws of the nation," he concedes, because "the judicial power should be commensurate with

64. *Id.* at 428.

65. BLACKSTONE'S COMMENTARIES, *supra* note 11, at 48.

66. *Id.*

67. *Id.* at 48-49. In the footnote Tucker argued as follows:

[In America, after the ratification of the Constitution,] the legislative power is restrained within certain limits, both in the Federal and State Governments, which neither the Congress, nor the State legislatures can transgress, without an absolute breach of the Constitutions from which the Legislative Authority is derived. For, both the Federal, and State Constitutions derive their authority and existence from the immediate act, and consent of the people. . . . These acts of the people having, then, the stamp of primitive authority, must be paramount to the act of the Legislative body, which derives its authority, and even its existence from that origin.

This argument, connecting sovereignty in the people to constitutional supremacy, was one that "Brutus" had anticipated fifteen years before the appearance of Tucker's edition of *Blackstone*.
<https://nsuworks.nova.edu/nlr/vol14/iss1/17>

the legislative.”⁶⁸ It is *inevitable* that the jurisdiction of the Supreme Court will extend as far as the jurisdiction of Congress because of the coterminous power principle, but it is also a concern, since in the American system of constitutional government legislative sovereignty has been restrained. “Brutus” is particularly concerned that among the restraints on legislative power may be those restraints derived from the language of article III itself, language apparently giving “not only a legal, but equitable jurisdiction of cases” to the Supreme Court.

At this point, however, one might wonder whether “Brutus” logic is internally contradictory, since it would seem that if he is concerned about the leviathanic presence of the federal government, then sovereignty in the people, reflected in the Constitution and interpreted by the Court, would be a check on that presence. But “Brutus” does not anticipate that check occurring; he recognizes the Court’s “authority” but he does not see that authority as functioning to restrain Congressional powers. Indeed the next paragraphs in “Brutus” argument deal with “the evil consequences that will flow from the exercise of [very extensive] power” by the Supreme Court. Here is one of his examples:

The constitution . . . gives the legislature full power to pass all laws which shall be proper and necessary for the purpose. And they certainly must make provision for these purposes, or otherwise the power of the judicial will be nugatory. . . . We must, therefore, conclude, that the legislature will pass laws which will be effectual in this head. An individual of one state will then have a legal remedy against a state for any demand he may have against a state to which he does not belong. Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer . . . Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government . . . It is easy to see, that when this once happens, the notes of the state will pass rapidly from the hands of citizens of the state to those of other states.⁶⁹

Notice that in “Brutus” example, the Court and Congress are in a symbiotic relationship with one another, expanding the powers of “the general government” at the expense of the states. Notice further that broad article I powers (signified by the Necessary and Proper

68. *Id.* at 428.

69. ANTI-FEDERALIST, *supra* note 34, at 431-35.

Clause) reinforce broad article III powers. Broad article III powers, symbolized by the reach of the Court's jurisdiction into areas as "local" and discrete as state debts to individuals, reinforce the broad reach of the general government's sovereignty. Finally, notice that the "losers" in the example are the states, who will be responsible for their debts not only to their own citizens, but to citizens of other states to whom debt notes have been transferred. The entire example may seem arcane to moderns, accustomed not only to different theories of constitutional sovereignty, but to different commercial exchange practices.⁷⁰ Nevertheless, to "Brutus" it is a possibility worth contemplating.

At this point in his argument "Brutus" begins an extensive discussion of the original and appellate jurisdiction of the Court, which he, of course, finds troubling in its potential scope. He raises some conventional Anti-Federalist bugaboos, such as the absence of jury trials in appellate cases in the federal courts, the difficulties in a single Court having jurisdiction over so extensive a geographic territory, and the "trouble and expense to . . . parties" from a dual system of courts.⁷¹ He then turns to his last, most significant, and most revealing argument, the argument "that the Supreme Court under this constitution would be exalted above all other power in the government, and subject to no controul."⁷²

As noted, several commentators have appreciated the significance of "Brutus'" last argument, which represents the fullest and clearest discussion of judicial review prior to *Marbury v. Madison*.⁷³ For present purposes, however, a less crystalline passage from that discussion is relevant. To reach that passage, we need to proceed a little further into the argument itself. "Brutus" next introduces the idea of judicial "independence" in the American constitutional structure. "Independence" for the Justices of the Supreme Court means more, "Brutus" argues, than life tenure and fixed salaries, as in England; it also means "there is no power above [the justices], to controul any of their decisions."⁷⁴ "In short," "Brutus" concludes, the justices "are independent of the people, of the legislature, and of every power under heaven. Men

70. For a discussion of late eighteenth and early nineteenth century commercial exchange practices as reflected in secured transactions cases, see G. E. WHITE, *supra* note 9, at 794-828.

71. 2 ANTI-FEDERALIST, *supra* note 34, at 431-35.

72. *Id.* at 437-38.

73. 2 ANTI-FEDERALIST (Brutus) 137 (1803).

74. 2 ANTI-FEDERALIST, *supra* note 34, at 438.

placed in this situation will generally soon feel themselves independent of heaven itself."⁷⁵

"Brutus" then proceeds "to illustrate the truth of these assertions."⁷⁶ He contrasts the situation of judges in America with that of judges in England, noting the supremacy of the Constitution and of constitutional interpretation and the absence of removal powers save impeachment. Then comes a third illustration, in the form of a claim that "the power of [the Supreme Court] is in many cases superior to that of the legislature."⁷⁷ He elaborates on this claim, repeating many of the themes he has already introduced, asserting that the Court "will be able to extend the limits of the general government gradually, and by insensible degrees," and concludes that the Constitution "was calculated to abolish entirely the state governments, and to melt down the states into one entire government."⁷⁸ He then summarizes his position in a ringing passage:

In this situation, the general legislature, might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution. If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.⁷⁹

By now this language is familiar, the language of the coterminous power theory. But then "Brutus," having sketched the chimera of consolidation, turns to the question of restraints on the powers of the federal government. He asserts that "it is of high importance that powerful checks should be formed to prevent the abuse of" the great and extraordinary powers vested in that government by the Constitution.⁸⁰ It is "the true policy of a republican government . . . to frame [its structure] . . . in such manner, that all persons who are concerned in the government, are made accountable to some superior for their con-

75. *Id.*

76. *Id.*

77. *Id.* at 440.

78. *Id.* at 441.

79. *Id.* at 441-42.

80. *Id.* at 442.

duct in office."⁸¹ And now, at long last, we reach the passage which has been the object of our search, a passage that seems as alien as the quotation from Tucker:

To have a government well administered in all its parts, it is requisite [that] the different departments of it should be separated and lodged as much as may be in different hands. The legislative power should be in one body, the executive in another, and the judicial in one different from either—But still each of these bodies should be accountable for their conduct. Hence it is impracticable, perhaps, to maintain a perfect distinction between these several departments—For it is difficult, if not impossible, to call to account the several officers in government, without in some degree mixing the legislative and judicial. The legislature in a free republic are chosen by the people at stated periods, and their responsibility consists, in their being amenable to the people. When the term, for which they are chosen, shall expire, who will then have the opportunity to displace them if they disapprove of their conduct—but it would be improper that the judicial should be elective, because their business requires that they should possess a degree of law knowledge, which is acquired only by a regular education, and besides it is fit that they should be placed, in a certain degree in an independent situation, that they may maintain firmness and steadiness in their decisions. As the people therefore ought not to elect the judges, they cannot be amenable to them immediately, some other mode of amenability must therefore be devised. . . . [O]n this plan we at last arrive at some supreme [authority], over whom there is no power in controul but the people themselves. This supreme controuling power should be in the choice of the people, or else you establish an authority independent, and not amenable at all, which is repugnant to the principles of a free government.⁸²

There is a great deal one could say about this passage—it is one of the clearest examples we have of the degree to which debates over article III of the Constitution were influenced by the premises of republican theory—but for present purposes a particular feature of "Brutus" logic will suffice. "Brutus" begins the passage with a familiar invocation of the republican principle of a representative government with sovereignty located in "the People." He then moves from that invocation to an endorsement of separation of powers that has a distinctly

⁸¹ *Id.*
⁸² *Id.* at 442-43.

modern ring. And then come two curious logical transitions. After the sentence "[t]he legislative power should be in one body, the executive in another, and the judicial in one different from either," he inserts a "but still." Then follows the sentence "each of these bodies should be accountable for their conduct," and then "Brutus" inserts a "hence." He then proceeds to discuss the concepts of judicial independence and accountability in the remainder of the passage.

Why the "but still"? Moderns would feel that the separation of powers principle *reinforces* the accountability principle; "Brutus" writes as if accountability *undermines* a pure conception of separation of powers. And why the "hence"? Moderns would suspect that a good way to "call to account" institutions of government is to insist upon a precise definition of their functions and spheres of influence; "Brutus" writes as if accountability makes such definitions problematic. Here again we appear to be entering a lost world of intellectual discourse.

The key to unraveling "Brutus'" logic comes with a realization that his subscribing to the assumptions of the coterminous power theory produces conceptions of judicial independence and accountability that we no longer hold. He simultaneously embraces two conceptions of judicial independence—*independence as professional status* and *independence as political autonomy*—and he sees an inevitable conflict between them. Judges are savants: "their business requires that they should possess a degree of law knowledge;" and thus, they cannot be elected by the people.⁸³ Moreover, judges need to maintain "firmness and steadiness in their decisions," another reason for their not being "amenable to [the people] . . . immediately."⁸⁴ These characteristics of judges are associated with independence. And yet, in a republican government, the "supreme controlling power should be in the choice of the people, or else you establish an authority independent, and not amenable at all."⁸⁵

Moreover, these two conceptions of independence foster two simultaneous conceptions of judicial accountability, and "Brutus" sees *an inevitable* conflict between *them*. The first conception of independence fosters an idea that judicial accountability should be *indirect* (judges "cannot be amenable to [the people] immediately").⁸⁶ The second conception fosters an idea that in a republican government, judicial inde-

83. *Id.* at 443.

84. *Id.*

85. *Id.*

86. *Id.*

pendence can *overwhelm accountability*, leaving no checks on judges at all. It is instructive that after the last sentence in the passage quoted above, "Brutus" says, "Agreeable to these principles I suppose the supreme judicial ought to be liable to be called to account, for any misconduct, by some body of men, who depend on the people for their places,"⁸⁷ and then, in the very last portions of his argument, discusses the role of the Senate. His discussion, however, is vague and undeveloped, especially in contrast with his discussion of the nature of judicial powers. He notes that the Senate itself "will possess a strange mixture of legislative, executive and judicial powers. . . ."⁸⁸

The "Brutus" essays are of such high quality, particularly with respect to the nature of the judicial powers envisaged in the Constitution's text, that one can hardly leap to the conclusion that in some places "Brutus'" capacity to reason deserted him, and he became incoherent. Indeed the conclusion one reaches is that in his discussion of judicial independence and accountability, "Brutus'" logic was precisely what one would expect from a commentator who did not hold modern conceptions of separation of powers, but held instead a conception of the sovereign powers in separate branches of government reinforcing one another. Moreover, one might well conclude that "Brutus'" logic was the logic of a commentator imbued with the notion that in any "well administered" republican government, power *should* but *could* not fully be located in the people; thus, accountability in the modern sense would not be possible. Finally, one might well conclude that "Brutus'" sense of the double-edged nature of judicial "independence" led him to be less sanguine about the possibility of political checks on federal judges, and thus more fearful than moderns of the possibility for "unlimited" judicial power under the Constitution. In short, the assumptions of the coterminous power theory were embedded in the entire structure of "Brutus'" argument.

The evolution of the coterminous power theory from "Brutus" to Tucker does not require comparable detail; no other judge or commentator matched the depth and refinement of "Brutus'" version. Still, there is scattered evidence that the assumptions held by "Brutus" remained extant not only up to the time of Tucker's treatise, but well beyond.

An early example can be found in the 80th of the *Federalist* pamphlets, written by Alexander Hamilton, which discussed the extent of

87. *Id.* at 443.

88. *Id.* at 445.

the authority of the federal judiciary.⁸⁹ In arguing that the extent of federal judicial authority ought to be very large, Hamilton referred to the "political axiom" that "the judicial power of a government is coextensive with its legislative power."⁹⁰ Here we see the coterminous power principle being endorsed by a person of a quite different ideological persuasion from that of "Brutus" and Tucker, and being described as a "political axiom" of then current political theory.

The next example comes from an opinion by Judge Richard Peters in the federal circuit court case of *United States v. Worrall*, decided in 1798.⁹¹ The case involved an indictment for bribery, and raised the same issue as *Williams v. United States*,⁹² namely whether the federal courts could enforce a common law of crimes.⁹³ Peters concluded that they could, and his reasoning was as follows:

Whenever a government has been established, . . . a power to preserve itself, was a necessary, and an inseparable concomitant. But the existence of the Federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offenses of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the State tribunals The power to punish misdemeanors, is originally and strictly a common law power. . . . It might have been exercised by Congress in form of a Legislative act; but, it may, also . . . be enforced in a course of Judicial proceeding. Whenever an offence aims at the subversion of any Federal institution . . . from its very nature, it is cognizable under their authority; and consequently it is within the jurisdiction of [the federal courts]⁹⁴

Notice in the passage that Peters has revived Blackstonian arguments about the nature of sovereignty, giving them the same spin as "Brutus" and Tucker, and concluded that both Congress and the federal courts had an interest that diverged from that of the state courts. His analysis was not calculated to assuage Tucker's fears about the implications of a federal common law of crimes. It makes more explicable the next example which comes from Thomas Jefferson in an 1800

89. THE FEDERALIST No. 80, at 438 (A. Hamilton)(C. Rossiter ed. 1961).

90. *Id.* at 439.

91. *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798).

92. *Connecticut Courant*, April 30, 1799.

93. *Worrall*, 2 U.S. (2 Dall.) at 384 (1798).

94. *Id.* at 395.

letter in which he is also discussing the issue of a federal common law of crimes. In the letter Jefferson said, "[I]f the principle of a common law being enforced in the United States were adopted, it would possess the general government at once of all the powers of the state governments and reduce us to a single consolidated government."⁹⁵

In the letter, Jefferson has reached a position equivalent to that of Tucker: once extensive jurisdiction of federal courts is established (through the common law of crimes), it follows that the "general government" (not just the courts, but also Congress) will have "all the powers of the state governments." Notice also the phrase "consolidated government," employed by the Anti-Federalist commentators. "Consolidation" was to become the code word for those critics on the Marshall Court who believed the logic of the coterminous power theory would lead to the annihilation of state sovereignty in the American republic.

By way of summary, an example may help particularize the fears of those who believed that the principle of coterminous power would lead inevitably to consolidation. Assume that a contract dispute occurs in Virginia. Recall that neither *Erie v. Tompkins*⁹⁶ nor its longstanding predecessor, *Swift v. Tyson*,⁹⁷ are in existence, so no clear rules exist as to what "law" governs contract disputes, whether in federal or state courts. Assume further that the contract dispute involves persons who are residents of different states. Under article III of the Constitution, diversity of citizenship exists, and the case can be brought in federal court. Given the absence of *Swift* or *Erie*, the federal court before which the dispute is brought can follow the common law of Virginia or choose its own "federal" rule of law. "Brutus," Tucker, Jefferson, and the other anti-consolidationists were assuming that the federal court, being a "department" of the "federal head," will choose its own rule, and that the rule may well be different from the applicable Virginia rule. They were assuming, further, that once the federal court made that choice, federal power over Virginia contract disputes would be established, and then Congress would be able to regulate Virginia contract disputes if it so chose. Such assumptions were embedded in the passage from Tucker with which this discussion began.

95. Letter from Thomas Jefferson to Gideon Granger (Aug. 18, 1800) reprinted in THE WRITINGS OF THOMAS JEFFERSON 451 (P. Ford ed. 1892).

96. 304 U.S. 64 (1938).

97. 41 U.S. (16 Pet.) 1 (1842).

II

When I noticed the evidence of the cluster of assumptions held by "Brutus," Hamilton, Peters, Jefferson, Tucker, and others, I went back through the familiar Marshall Court sovereignty cases and asked myself whether the lawyers arguing those cases, or the justices who decided them, also held the assumption of the coterminous power theory. I found that they did hold those assumptions. I then asked myself whether in their pamphlets, the critics of the Court's decisions in those cases, in their pamphlets, also shared those assumptions and, if so, how their belief in coterminous power theory shaped their criticism. What follows is a brief summary of my inquiries.

Taking the cases topically, and chronologically, the first is *Martin v. Hunter's Lessee*.⁹⁸ This case, as students of constitutional law know, raised the question of whether section 25 of The Judiciary Act of 1789, giving the Supreme Court jurisdiction to review the final decisions of state courts or matters involving the construction of state statutes which allegedly conflicted with federal statutes or treaties, was constitutional. Justice Story, for a non-unanimous Court (Johnson concurred separately), held not only that the Supreme Court did have jurisdiction, but that article III *required* Congress to give the Court jurisdiction; he took the language of sections 1 and 2 of that article ("The judicial power of the United States *shall* be vested in one supreme court" and "The judicial power *shall* extend to *all* Cases . . . arising under this Constitution") as imperative, not hortatory or discretionary. His argument assumed a constitutional partnership between Congress and the federal courts, in which, once the Constitution has given power to the federal government in general terms, Congress and the federal courts could adopt their own means to effectuate legitimate objects. Every congressional extension of legislative powers would thus create another area of competence for the federal courts, and every extension of the jurisdiction of the federal courts would create another potential area for congressional intervention. As Story put it, article III was "part of the very same instrument which was to act on [sic] not merely upon individuals but upon states and to deprive them altogether of some power of sovereignty and restrain and regulate them in the exercise of others."⁹⁹ It is not without interest, in light of the earlier comments I discussed, that Story intimated elsewhere in his *Martin* opinion that

98. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

99. *Id.* at 438.

Congress was not permitted to let federal criminal law cases be decided in the state courts.¹⁰⁰

The next sovereignty case, considered topically, is *Cohens v. Virginia*,¹⁰¹ a sequel to *Martin*. *Cohens* was a sequel because it involved the same question of Supreme Court review of a state court decision, but this instance involved a common law decision on a matter of criminal law. Of course, the Marshall Court concluded that it again had the constitutional power to review state courts in such instances. In arguing that the Court ought to have such a power, Marshall, for a unanimous Court, said: "One of the great objects of the Constitution is the establishment of a close and firm union. One of the instruments by which this duty may be peaceably performed was the judicial department."¹⁰² He then raised a rhetorical question, and answered it:

Why was it necessary that federal courts be charged with deciding cases affecting federal laws? . . . The answer comes from an argument that is drawn from the nature of government. There is a proposition that may be considered a political axiom. It is that the judicial power of every well-constituted government must be coextensive with the legislative and must be capable of deciding every judicial question which grows out of the Constitution and laws.¹⁰³

In reasoning on this coterminous power axiom as an "abstract question," he continued:

[T]here would, probably, exist no contrariety of opinion respecting it. . . . We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution which ought never to be overlooked.¹⁰⁴

In short, Marshall was suggesting in *Cohens* that the Constitution had incorporated the principles of the coterminous power theory. He was reading the Constitution as saying that the judicial power of the federal government shall be coextensive with the power of its legislature.

Before discussing the sovereignty arguments advanced by pam-

100. *Id.* at 336-37 (emphasis added).

101. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

102. *Id.* at 382.

103. *Id.* at 384.

phleteer critics of the *Martin-Cohens* sequence, I want to take up *McCulloch v. Maryland*,¹⁰⁵ decided between *Martin* and *Cohens*, in which the full implications of the coterminous power logic were grasped by the Court and its contemporaries. *McCulloch*, from the perspective of the coterminous power theory, is the flip side of both *Martin* and *Cohens*. The "axiom," as propounded by Hamilton, had stated only that the judicial power shall be coextensive with that of the legislature, but "Brutus," Tucker, Jefferson, and others had, as we have seen, extended the implications of that axiom. In *McCulloch*, could thus easily have been seen as a case raising the question of whether under the Constitution, Congress's power should be coextensive with that of the federal courts. In *McCulloch*, there had been a congressional statute chartering a national bank, and then a Maryland statute attempting to tax the bank. The questions were (1) whether the federal judiciary, once it was determined that it had jurisdiction to consider the constitutionality of the statute, could then sustain it, thereby making Congress the exclusive creator and regulator of interstate banks, and (2) whether the federal judiciary could further combine this extension of federal legislative powers by invalidating state efforts to tax such banks.

I shall not belabor the familiar arguments employed by Marshall to answer that question affirmatively, again for a unanimous Court. I simply want, at this point, to sketch the implications of the *Martin-Cohens* sequence and *McCulloch* for those taking seriously the assumptions of the coterminous power theory. In *Cohens*, with *Martin* on the books, such observers would notice that Congress had passed a lottery for the District of Columbia that competed with a Virginia state lottery. The federal judiciary, in the person of the Marshall Court, had deemed the D.C. lottery law "a law of the United States" within the meaning of article III, section 2, giving the Court jurisdiction to examine whether Congress had occupied the field of lotteries and to conclude, at least potentially, that states had no power to enact lotteries. The Marshall Court did not so conclude in *Cohens*, leaving the Virginia lottery intact. But the symbiotic relationship between expanding federal judicial power and expanding legislative power suggested by the case would not have been missed by those sharing "Brutus," Tucker's and Jefferson's assumptions.

Consider *McCulloch* in the same vein. Congress had chartered a bank; a state had attempted to tax it. The federal judiciary, personified

105. 17 U.S. (4 Wheat.) 316 (1819).

by the Court, concluded that it had jurisdiction to hear the case, and in the exercise of that jurisdiction, the Court decided in favor of the federal government and against the states on both of the principled sovereignty issues. If one is operating in a world in which one assumes that for every extension of federal judicial power there will be a like extension of federal legislative power, then it becomes intelligible to argue, as critics of the decisions argued, that *Martin*, *McCulloch*, and *Cohens* were paving the road to "consolidation," to the total obliteration of state sovereignty, and to the creation of a leviathan of federal power. Moreover, other arguments advanced by those critics, such as the (now arcane) "compact" theory of sovereignty in the American republic, whose premise was that in the formation of the Constitution, sovereignty was reserved in the states forming the federal government, and not in the people at large, also take on an increased intelligibility.

I now want to take up some of the language of the critics. After *Martin* was handed down, there was no critical response, save for the Richmond Enquirer's implicit defense of Story's majority opinion by printing Johnson's concurrence in full, while ignoring Story's opinion of the Court.¹⁰⁶ Next came *McCulloch*, which, as noted, produced a rich series of pamphlet essays in the Enquirer, authored, pseudo-anonymously, by William Brockenbrough and Spencer Roane,¹⁰⁷ and provoking Marshall's two pseudo-anonymous defenses of the Court. I will not dwell on this pamphlet war between Marshall and his Virginia adversaries, which has been set forth with admirable lucidity and detail by Professor Gunther.¹⁰⁸ I merely want to note the recurrence, in passages from Brockenbrough and Roane, of "code words" used earlier by "Brutus," Tucker, and the others.

Brockenbrough, writing approximately three weeks after *McCulloch* came down, associated the "doctrine" which he saw endorsed in *McCulloch*, that the states were not "parties to the federal compact," with another "absurd and dangerous doctrine" that "the common law of England made a part of the law in [the federal courts]."¹⁰⁹ He thus

106. Richmond Enquirer, Apr. 11, 1816.

107. Identification of Brockenbrough and Roane as the authors of the essays (Brockenbrough wrote under the pseudonym "Amphictyon" and Roane under "Hampden") can be found in a letter from John Marshall to Bushrod Washington, Aug. 3, 1819, John Marshall Papers, Library of Congress.

108. See G. Gunther, *supra* note 9; see also G. E. WHITE, *supra* note 9, at 521-24, 552-67.

109. My text here is G. GUNTHER, *supra* note 9, at 57. Gunther's book is by far the most accessible source of the pamphlet war over *McCulloch*.

equated the aggrandized view of federal legislative power articulated in *McCulloch*, with the aggrandized view of federal judicial power apparently rejected in *United States v. Hudson and Goodwin*,¹¹⁰ which had declared that no federal common law of crimes existed. One of the reasons for rejecting a federal common law of crimes had been fears of the partisan orientation of the federal courts. Brockenbrough closed his essays on *McCulloch* by suggesting that the Supreme Court of the United States could not be "a perfectly impartial tribunal . . . when the contest was between the United States and one of its members."¹¹¹ In short, Brockenbrough treated Congress and the Supreme Court as having identical interests, as being parts of the federal leviathan.

Roane was even more pointed. He called *McCulloch* a decision that intermingled "that legislative power which is everywhere extending the sphere of its acting and drawing all power into its impetuous vortex" and "[t]hat judicial power which . . . has also deemed its interference necessary."¹¹² He claimed that the Marshall Court had given "a general letter of attorney to the future legislators of the Union"¹¹³ by deciding *McCulloch*; that the decision amounted to "an unlimited grant of power"¹¹⁴ to Congress; and that the decision treated the newly formed government as "a consolidated one."¹¹⁵ He ended his attack with this passage, "The supreme court is but a department of the general government . . . The general government cannot decide this controversy and much less can one of its departments. They cannot do it unless we treat under foot the principle which forbids a party to decide his own cause."¹¹⁶

Thus, the principal charge hurled at the Marshall Court by Brockenbrough's and Roane's essays—that the Court was an architect of "consolidation"—can be seen as informed by the assumptions of the coterminous power theory. Consolidation, for these critics, would emerge if three constitutional doctrines were accepted. The first doctrine was predicated on a refusal to admit that the Constitution was a "compact," reserving sovereignty in the states. It was the doctrine that pronounced sovereignty of the "Union," not the states, with reserved

110. 11 U.S. (7 Cranch) 32 (1812).

111. G. GUNTHER, *supra* note 8, at 58.

112. *Id.* at 108.

113. *Id.* at 110.

114. *Id.* (emphasis in the original).

115. *Id.* at 145.

sovereignty in the "people." This doctrine had, of course, been forcefully elaborated in *McCulloch*. The second doctrine was that espoused in *Martin* and *Cohens*: the federal judiciary was the ultimate arbiter of constitutional questions even when one of the sovereign states was a party in litigation raising such questions. The third doctrine was that implicitly promulgated by the *Martin-McCulloch* sequence: the federal courts could interpret the Constitution so as to enhance their own powers and the powers of Congress. It was this doctrine which provoked Roane to speak of a "party deciding his own cause," the doctrine that for every extension of federal judicial power there could be a like extension of federal legislative power and vice versa.

Consolidation was thus an entirely logical consequence, for critics of the Marshall Court, of the political axioms of the coterminous power theory. It is important to understand, as we try to recreate the world of Marshall and his contemporaries, that the "obvious" constitutional limitations on the powers of both Congress and the federal courts identified by moderns—most influentially in the post World War II era by Henry Hart and Herbert Wechsler¹¹⁷—were not at all obvious to those critics who subscribed to the assumptions of the coterminous power theory. Indeed, from an anti-consolidationist perspective, the Marshall Court's actions in *Martin*, *McCulloch*, and *Cohens* suggested that constitutional interpretation and consolidation could be identical exercises. After all, in those cases, the Court had based its initial jurisdiction to resolve constitutional issues on congressional treaties or statutes. The Court then, having assumed that jurisdiction, interpreted the constitutional significance of those treaties or statutes in a fashion which expanded its own powers and those of Congress.

One might suspect that the language and assumptions of the coterminous power theory were confined to the Marshall Court's critics, the eventual "losers" in the great sovereignty debates of the early nineteenth century. Such obscurantist epistemology is often characteristic of "losers" in history. But Marshall himself, we have seen, shared the language and assumptions. Consider, for example, his pamphlet rejoinder to Roane's critique of *McCulloch* and his opinion in the next major federal jurisdiction case of the Marshall Court, *Osborn v. Bank of the United States*.¹¹⁸

After reading Roane's "Hampden" essays, Marshall was incensed.

117. See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 312-40 (1953).

118. 22 U.S. (9 Wheat.) 738 (1824).

partments," he observed that it was "confined to the sphere of action prescribed to it by the people of the United States and within that sphere, performs its functions alone."¹²³ Republican separation-of-powers principles thus served to weaken the claim that the federal legislature and the federal judiciary had an identity of interest, because they were departments of the same government.

Marshall made two further counter-arguments. The first was that judges were "selected from the great body of the people for the purpose of deciding . . . judicial questions."¹²⁴ Judges were "made perfectly independent . . . to secure impartiality."¹²⁵ The construction of congressional powers under the Constitution by federal judges was thus, "not . . . the party sitting in his own cause,"¹²⁶ but "the application to individuals by one department of the acts of another department of the government."¹²⁷ If the judge was "personally disinterested,"¹²⁸ he was "as exempt from any political interest that might influence his opinion, as imperfect human institutions can make him."¹²⁹

The next rebuttal was that Roane had been misguided in claiming that the Court's "enlargement of the enumerated powers of congress . . . beyond the import of the words"¹³⁰ in *McCulloch*, demonstrated the identity of interest among the departments of the federal government. In that decision, Marshall pointed out:

In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. . . . [T]he court expressly says, 'should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would be the painful duty of [the Court] to say that such an act was not the law of the land.'¹³¹

Marshall's rejoinder to Roane reveals that he derived the ultimate check on the consolidationist tendencies of the coterminous power the-

123. *Id.* at 210.

124. *Id.* at 211-12.

125. *Id.* at 212.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 185.

131. *Id.* at 187.

ory from the "independence" and "disinterestedness" of the federal judiciary in a republican government. Federal judges were "exempt from political interest"; they were simply doing their duty of interpreting the Constitution so as to provide a peaceful means of resolving disputes and executing laws. They had been given that function by the people in ratifying the Constitution, and they had been "made perfectly independent" so as to ensure that they would perform it in a disinterested manner. Since their interest was not identical to that of the federal legislature, it followed that when Congress misguidedly sought to employ its powers in pursuit of an end which they had no constitutional authorization to pursue, the federal judiciary would follow the Constitution, rather than the pleasure of Congress. They would follow the will of the law.

One thinks here of "Brutus'" discussion of judicial independence and accountability. In that discussion, "Brutus" had expressed a deep ambivalence about the concept of judicial independence, suggesting that independence might be as much a barrier to accountability as a means of facilitating it. He was also not persuaded that independence led to judicial disinterestedness, suggesting that it might equally lead to judicial superiority, arrogance, and control of constitutional power.

Marshall, in his rejoinder to Roane, treated judicial independence as restraining rather than facilitating judicial power and even suggested that judicial independence undermined, rather than reinforced, the inexorability of the coterminous power theory. All of this was in an essay in which Marshall treated the coterminous power principle as an axiom.

Thus, in Marshall's rejoinder to Roane there is a paradox taken to lie at the center of the coterminous power theory. The presence of a judicial department of government, to execute and enforce the laws made by its legislative branch, was taken to be a necessary feature of "effective" governments. To the extent that the legislative department of a government expanded the area of its governance, the judicial department could be expected to expand its jurisdiction in kind. In this sense, the interests of the federal legislature and that of the federal judiciary were identical: it was an interest in maintaining effective government. But in construing the laws made by the federal legislature, the federal judiciary would not necessarily follow that legislature's interests. The judiciary's primary responsibility was to "the law," that is, to the Constitution. The paradox was that even though each extension of federal legislative power argued an extension of federal judicial power, the federal judiciary might, in the very exercise of that power,

find the extension unwarranted. Federal judges, while members of a department of the federal government, could not be expected to invariably have that government's interest in mind. Or, put another way, federal judges might invariably have their department's interest in mind, but that interest might be in following the law rather than in aggrandizing the powers of the federal legislature.

The paradox leads us to Marshall's opinion in *Osborn v. Bank of the United States*,¹³² and the second passage with which this essay began. The question in *Osborn*, of course, was whether the state of Ohio could impose an annual tax of \$50,000 on each branch of the Bank of the United States in the state. This question, after *McCulloch*, was hardly new, but there was an additional wrinkle in *Osborn*: the issue of whether the Bank of the United States could sue or be sued only in a federal court. Even this issue was not particularly vexing after *Cohens*, since constructions of the Bank's charter obviously raised "federal questions." But in many instances, the liability of the Bank in a suit against it might depend on a construction of state law. Did the Bank's charter prevent it from being sued in state courts even when state laws were at issue?

Marshall's opinion assumed that the last question had significant ideological and practical significance, since state courts would be hostile to the Bank and federal courts would not. This point had been made by counsel for the Bank in *Osborn*, who had argued that Congress's intent in chartering the Bank was to "erect a forum, to which the Bank may resort to justice." The linchpin of their argument was the coterminous power theory. As Henry Wheaton, the Court's Reporter, summarized the argument:

Those who framed the constitution, intended to establish a government complete for its own purposes, supreme within its sphere, and capable of acting by its own proper powers. They intended it to consist of three co-ordinate branches; legislative, executive, and judicial. In the construction of such a government, it is an obvious maxim, 'that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature.' The judicial authority, therefore, must be co-extensive with the legislative power. . . . The great object, then, of the constitutional provision, respecting the judiciary, must make it co-extensive with the power of legislation, and to associate them inseparably, so that where one went, the other might go along with it. . . . The Bank is, in effect,

for precluding state court jurisdiction over matters of state law where federal institutions were involved, was an architect of consolidation. He also seemed to be anticipating the possibility that even where Congress had not established power over an area, such as by creating an institution empowered to transact business in that area, the state courts would be prevented from exercising jurisdiction over that area simply because Congress might. In short, he was anticipating the sovereignty arguments in the Court's commerce clause cases, the first of which, *Gibbons v. Ogden*,¹³⁸ was decided by the Marshall Court the same term as *Osborn*.

Johnson was thus suggesting in his *Osborn* concurrence that the coextensive power axiom proved too much: it had no apparent relevance to those situations in which the federal government had expressed no desire to promote its own interests. In subsequent Marshall Court sovereignty cases, a theoretical rationale for greater state latitude in such situations was developed: the doctrine of "concurrent power," in which states were given the power to regulate even those areas over which Congress could exercise plenary authority if Congress had not established that authority. It is thus possible to see yet another of the leading doctrines in Marshall Court sovereignty cases—a doctrine first introduced in *Gibbons v. Ogden* itself—as being informed by coterminous power theory.

In the last portions of Marshall's *Osborn* opinion, Marshall reflected on the implications of his conclusion that a "sound construction" of the act chartering the Bank was that "it exempt[ed] the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States"¹³⁹ He was well aware that critics of the Court would notice that this construction, advanced by the federal judiciary, served to insulate an institution of the federal government from state control. In response, he formulated one of the classic dictums of American constitutional law, a portion of which is quoted in the beginning of this essay. Here is the dictum in full:

[The judicial] department has no will, in any case. . . . Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere

138. 22 U.S. (9 Wheat.) 1 (1824).

139. *Osborn*, 22 U.S. (9 Wheat.) at 866.

legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.¹⁴⁰

In Marshall's dictum, we can see how the aforementioned paradox associated with the coterminous power theory had become a rationale, not only for latitudinarian interpretations of the Constitution in sovereignty cases, but, more significantly, for judicial "discretion" in a republican constitutional government. Once the axiom that federal judicial power should be coextensive with federal legislative power was taken as a given, and the paradox was understood, judicial implementation of a federal law became nothing more than an act that gave effect to legislative will. The judiciary was merely "executing" the laws of a "well-constituted" government. The discretion that Marshall was exercising was "a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law."¹⁴¹ He and his judges were asserting their "independence."

III

What are the consequences of this exercise in recovering this lost dimension of the Marshall Court sovereignty cases? Several conclusions come to mind, some of them historical, others jurisprudential. I will take them up in that order.

Once the dimension of the coterminous power theory is restored to the discourse of the sovereignty cases, the fears of the Court's critics that the justices were headed on a path to consolidation become more credible. Since under the coterminous power theory an "effective" government needed to have courts to execute its laws, it followed that every extension of federal legislative power would yield a comparable extension of federal judicial power. Further, if one eventually added to that the diabolical relationship between federal court jurisdiction and federal court substantive rulemaking, the possibility of an unleashed federal judiciary, declaring its own common law rules and supplanting the state courts at every turn, became real. Moreover, once the Court

140. *Id.*

141. *Id.*

demonstrated in *McCulloch* that it was inclined to construe federal lawmaking powers broadly under the Constitution, the spiral effect of the coterminous power principle became apparent: a federal court whose jurisdiction had been enhanced by a federal statute now construed that statute so as to enhance federal legislative power.

Thus, the criticisms of Virginia opponents of the Court, long relegated to obscurity (not only because they were positions that "lost" over time, but also because they have appeared as increasingly arcane) take on added cogency once their starting assumptions are recreated. Moreover, the strategy of the Marshall Court majority appears more consolidationist: more determined to carve out a vast area of federal sovereignty, and to restrict state power accordingly. In this vein, the tacit decision of the Court majority to avoid latitudinarian constructions of federal legislative power after *McCulloch*, most notably in the Commerce Clause cases and also in the Cherokee cases of the 1830s, appears strategic as well.¹⁴² One suspects that the Court majority, sensing a growing hostility toward broad definitions of federal legislative power, in light of the nullification crisis and the growing chasm between slaveholding and nonslaveholding states, may have embraced the doctrine of concurrent sovereignty. The Court majority thereby cut back on its broad constructions of Congress's article I powers, so as to preserve its own broad jurisdictional powers under article III.

Eventually, of course, the coterminous power theory itself became reduced to insignificance. The ideas that the Court could only construe federal legislative power as far as the Constitution permitted it and could only exercise its jurisdiction as far as Congress permitted it, took hold. At that point, the "interests" of the federal legislature and the federal courts came to be seen as not often identical. The Constitution came to be pictured as a buffer between the branches of government, rather than a document that had incorporated the coterminous power principle. It became routine for the Court to find Congressional legislation constitutionally deficient, and periodically Congress tinkered with the Court's jurisdiction. As the expectations of critics that the federal legislature and the federal courts would act as one voice did not come to pass, the coterminous power theory lost its force and gradually dropped from the consciousness of commentators.

Thus, part of this exercise has been to restore an abandoned cluster of assumptions to its prior place of stature, and thereby, to recharge

what now seems, from a modern perspective, to be tired sovereignty debates among Marshall and his contemporaries that could have only one resolution. Another part, however, is not so bound in time. I began by suspecting that if the passage from Tucker, where he first identified the coextensive power axiom, now seems obscure, the passage from Marshall, where he disclaims any personal "discretion" to make law as a judge, provokes a wry smile. But "discretion," in the sense that Marshall used it, was not a modern concept and was itself linked to the assumptions of the coterminous power theory. As noted, the rationale for judicial discretion was based on several premises. One was that in every "well constituted" government there were three coordinate branches, each with its separate function, and the function of the judicial branch was to declare and to enforce the will of the lawmaking branches. A second was that there would be no identity of interest among the branches, *because* the branches performed separate functions and were staffed according to those functions. Hence, legislatures were expected to be "interested" and partisan, but judges were expected to be "disinterested" and "independent." A final premise was that judicial "discretion" was further checked by the "course prescribed by law" and by virtue of the judges themselves. It was a discretion granted to republican savants because of their professional expertise, their independence, and their commitment to civic responsibility.

But both contemporaries of Marshall and moderns have recognized that the Marshall Court decisions *were* partisan in the sense that of a variety of possible interpretations of the Constitution's clauses concerned with the respective sovereignty of the federal government and the states, the Court almost invariably chose interpretations restricting state sovereignty. Even in the Commerce Clause decisions, where the Court majority came to tolerate state regulation, its tolerance was only in the "dormant" areas, where Congress had not exercised its regulatory powers. In other areas, the Court restricted the states with a vengeance, and its activity was perceived by contemporaries as not "disinterested," but partisan. The deepest paradox of the Marshall Court sovereignty cases is that, despite this perception, Marshall was able to posit a definition of judicial "discretion," resting on a distinction between the "will of the judge" and the "will of the law," as if it were a distinction that truly constrained the Court, when the evidence was to the contrary.

The success of Marshall's disclaimer should acquaint us to some unfinished business. One sort of business is hortatory in its nature. American culture has made a power investment in the ideal of the rule

of law, as administered by "disinterested" judges; thus, arguments that seek to emphasize judicial disinterestedness and cast law as a body of neutral principles or a disembodied force to be discovered by savants, strike a deep chord. But the evidence of the Marshall Court sovereignty decisions is that we should be skeptical when such arguments are advanced by judges, and even more skeptical when they are advanced by commentators. When advanced by judges, the arguments may well be skillful rhetorical devices, designed to conceal the partisan nature of judging, and while we should not of course take them at face value, we may admire their willingness or even believe that they are ultimately necessary in a culture in which the rule of law ideal is deeply embedded, and in which trust and justice are complex and elusive goals.

But when advanced by commentators, such arguments are less excusable; instead of strategic, they appear merely to be naive. One could argue, simplistically, that the coextensive power axiom was only an axiom because judges declared it to be so; once they stopped such declarations, it ceased to be an axiom. That argument would be simplistic, because there were deeper cultural reasons for the legitimacy of the axiom. But there is a minimalist lesion in the history of Marshall Court sovereignty discourse just traced. Jurisprudential axioms are no more permanent than the judges who declare them; commentators sometimes lose sight of this phenomenon.

The more immediate unfinished business is of a less abstract sort. It is to explore in more detail the links between the ideology of late eighteenth and early nineteenth century American republicanism, and the emergence of the cluster of assumptions, including assumptions about judicial discretion and the nature of law itself, that I have called the coterminous power theory. I believe that at the bottom, the coterminous power theory was a distinctive product of American federal republicanism, and in this essay I have traced some of its origins and some of its ramifications for Marshall Court decisions. The next project might be to explore the working out of coterminous power assumptions in constitutional decisions that stretch well beyond the Marshall Court. For it is possible that the discourse of constitutional sovereignty issues was influenced by the assumptions of the coterminous power theory far longer, and far more significantly, than we have understood. After all, the idea of judicial discretion articulated by Marshall in *Osborn*, and the related idea that federal judges were free to choose between federal and state sources of law, survived to the tenure of Holmes and Brandeis. We may be closer to the world of Hamilton and "Brutus" than we think even though it is light-years from it.